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Mohd Nazri bin Ismail v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–48–02 OF 2013
BALIA YUSOF, AZIAH ALI AND ROHANA YUSUF JJCA
28 OCTOBER 2014

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused person charged for trafficking dangerous drugs — Whether accused person custody, control and mens rea possession — Invocation of presumption of trafficking under s 37(da) of the Dangerous Drugs Act 1952 — Whether defence probable — Whether defence afterthought — Whether judge erred in allowing prejudicial evidence — Whether there should have been trial within a trial — Whether case judicially appreciated — Dangerous Drugs Act 1952 s 39

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The appellant was charged and convicted for two offences under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in 26,462g of cannabis and 780g of cannabis. He was sentenced to death and hence the

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appeal to this court. SP6 and his team had rushed and arrested the appellant and found six packets suspected to be cannabis. On the evidence adduced by the prosecution, the judge found that the prosecution had proved that the appellant had custody, control and mens rea possession of the drugs. The judge invoked the presumption of trafficking under s 37(da) of the Act. The

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appellant's defence was that he had no knowledge of the drugs and that the drugs belonged to one 'Misai'. According to the appellant, he was also a masseur and he would go to his client's house or his clients would come to his apartment. The appellant says that two days before his arrest, SP11 Azizi bin Saleh, who is also known as 'Misai' had come to his house for a massage. SP11

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had brought a bag with him and when SP11 left after the massage, SP11 had left the bag in his apartment. SP11 had also requested to borrow his car and he had lent the car to SP11, who then returned the car to him on the morning of the day that he was arrested. Thus the defence sought to show that the drugs found in the car and in the apartment belonged to SP11. SP11 in his evidence

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admitted that he knows the appellant and his wife SP4, but denied having gone to the appellant's house or having borrowed the appellant's car or motorcycle. He said he has his own car. He denied having seen the bags or knowing their contents. At the end of the defence case, the judge found that the defence was an afterthought. Her Ladyship accepted the evidence of SP11 and found that

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the evidence of the investigating officer SP12, who testified that his investigation showed that SP11 was not involved in this case, supported SP11. The issues that arose in the present appeal were whether that the judge had erred in allowing prejudicial evidence and had failed to hold a trial within a trial; that the judge had failed to apply the '*Radhi*'s direction'; that the judge

had failed to judicially appreciate the entire case. A

Held, the dismissing appeal; affirming convictions and sentences:

(1) Nowhere in his evidence did the appellant allege that force or coercion was used on him by SP6. Nowhere in the submissions was the issue of voluntariness raised. The appellant did make the statements to SP6 voluntarily. The question of holding a trial within a trial did not arise. There was also no basis for the submission that it was possibly SP11 who had supplied the information leading to the discovery of the drugs. SP11 was not asked whether he was the person who had given to the police the information that led to the discovery of the drugs. In fact, SP11 in cross-examination disagreed with the suggestion that he was arrested on the same day that he had returned the car to the appellant (see paras 24 & 26). B C

(2) The appellant's answers to SP6 together with his conduct which led to the discovery of the drugs in the car and in his apartment were admissible. Therefore the judge had not misdirected herself in considering these matters when making her decision at the end of the prosecution case. There was no merit on this issue (see para 26). D E

(3) The judge had considered the evidence of SP11 and had accepted it. Assessing credibility is difficult and is best left to the trial judge who had the audio-visual advantage of a witness in action. Her Ladyship also found that the evidence of SP12, the investigating officer, who testified that his investigation showed that SP11 was not involved, as supporting the evidence of SP11. Having considered the defence evidence and the prosecution evidence, Her Ladyship came to the definite conclusion that the appellant's defence is an afterthought and that the defence had failed to raise a reasonable doubt in the prosecution case. The court agreed with the judge (see para 32). F G

(4) Although the court agreed with the position taken by the prosecution in relation to the manner the grounds of judgment was written in this case, it was not to be taken as condoning the act of copying written submissions. It is highly improper for a judge to copy the written submissions of counsel wholesale, and without acknowledging the source. In the present case, it was patently clear in the judgment of the judge that the written submissions had been copied wholesale without acknowledgment (see para 34). H

(5) Notwithstanding the copious reproduction of the prosecution's submissions in the grounds of judgment, on the evidence adduced, the judge would have come to the same finding ie that the prosecution has established a prima facie case against the appellant. There was ample evidence to support the finding of the judge that the appellant had I

custody, control and mens rea possession of the drugs and in invoking the presumption under s 37(da) of the Act. Thus on the totality of the evidence, the judge was correct to order the appellant to enter his defence (see para 36).

[Bahasa Malaysia summary

Perayu telah dituduh dan disabitkan dengan dua pertuduhan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') kerana mengedar kanabis seberat 26,462g dan kanabis seberat 780g. Dia telah dihukum mati dan justeru rayuan kepada mahkamah ini. SP6 dan pasukannya telah menyerbu dan menangkap perayu dan mendapati enam paket disyaki kanabis. Berdasarkan keterangan yang dikemukakan oleh pihak pendakwaan, hakim mendapati pihak pendakwaan telah membuktikan bahawa perayu mempunyai jagaan, kawalan dan mens rea terhadap milikan dadah itu. Hakim telah menggunakan andaian pengedaran di bawah s 37(da) Akta tersebut. Pembelaan perayu adalah bahawa dia tidak mempunyai pengetahuan tentang dadah itu dan bahawa dadah itu dimiliki oleh seorang dikenali sebagai 'Misai'. Menurut perayu, yang merupakan tukang urut dan akan ke rumah pelanggan atau pelanggannya akan datang ke apartmennya. Perayu mengatakan bahawa dua hari sebelum dia ditangkap, SP11 Azizi bin Saleh, yang juga dikenali sebagai 'Misai', telah datang ke rumahnya untuk diurut. SP11 telah membawa beg bersamanya dan sejurus selepas berurut, SP11 telah meninggalkan beg tersebut di apartmennya. SP11 juga meminta untuk meminjam keretanya dan perayu telah meminjamkan kereta kepada SP11, yang kemudian telah memulangkan keretanya pada pagi hari perayu ditangkap. Oleh itu pembelaan memohon untuk menunjukkan bahawa dadah itu dijumpai dalam kereta dan di apartmen milik SP11. SP11 dalam keterangannya mengakui bahawa dia mengenali perayu dan isterinya SP4, tetapi menafikan telah ke rumah perayu atau telah meminjam kereta atau motorsikal perayu. Dia mengatakan mempunyai kereta sendiri. Dia menafikan telah melihat beg atau mengetahui kandungannya. Di akhir kes pembelaan, hakim mendapati bahawa pembelaan itu suatu yang telah difikirkan kemudian. Yang Arif hakim telah menerima keterangan SP11 dan mendapati bahawa keterangan pegawai penyiasat SP12, yang memberi keterangan bahawa siasatannya menunjukkan SP11 tidak terlibat dalam kes ini, menyokong SP11. Isu-isu yang timbul dalam rayuan ini adalah sama ada hakim itu terkhilaf dalam membenarkan keterangan bersifat prejudis dan telah gagal untuk mengadakan perbicaraan dalam perbicaraan; bahawa hakim itu telah gagal untuk mengguna pakai '*Radhi*'s direction'; bahawa hakim itu telah gagal untuk memahami secara kehakiman keseluruhan kes itu.

Diputuskan, menolak rayuan; mengesahkan sabitan dan hukuman:

(1) Tiada apa-apa dalam keterangannya, perayu telah mendakwa bahawa kekerasan atau paksaan telah digunakan ke atasnya oleh SP6. Tiada

dalam penghujahan isu suka rela dibangkitkan. Perayu telah membuat kenyataan kepada SP6 secara suka rela. Persoalan tentang mengadakan perbicaraan dalam perbicaraan tidak timbul. Tiada juga asas untuk penghujahan bahawa ia berkemungkinan P11 yang telah membekalkan maklumat kepada pihak polis yang membawa kepada penemuan dadah itu. SP11 tidak disoal sama ada dia adalah orang yang telah memberikan maklumat yang membawa kepada penemuan dadah itu. Bahkan, SP11 dalam pemeriksaan balas tidak bersetuju dengan cadangan bahawa dia telah ditangkap pada hari sama dia memulangkan kereta kepada perayu (lihat perenggan 24 & 26).

(2) Jawapan perayu kepada SP6 beserta tingkah lakunya yang membawa kepada penemuan dadah itu di dalam kereta dan di apartmennya boleh diterima pakai. Oleh itu hakim tidak salah arah dalam mengambil kira perkara-perkara tersebut apabila beliau membuat keputusannya di akhir kes pendakwaan. Tiada merit berhubung isu ini (lihat perenggan 26).

(3) Hakim telah mengambil kira keterangan SP11 dan telah menerimanya. Untuk menilai kredibiliti adalah sukar dan lebih baik diserahkan kepada hakim perbicaraan yang mempunyai kelebihan audio visual saksi dalam tindakan. Yang Arif hakim juga mendapati bahawa keterangan SP12, pegawai penyiasat, yang memberi keterangan bahawa siasatannya menunjukkan SP11 tidak terlibat, sebagai menyokong keterangan SP11. Setelah mempertimbangkan keterangan pembelaaan dan keterangan pendakwaan, Yang Arif hakim membuat kesimpulan yang jelas bahawa pembelaan perayu adalah suatu yang telah difikirkan kemudian dan bahawa pembelaan telah gagal menimbulkan keraguan munasabah dalam kes pendakwaan. Mahkamah bersetuju dengan dapatan hakim itu (lihat perenggan 32).

(4) Walaupun mahkamah bersetuju dengan kedudukan yang diambil oleh pendakwaan berkaitan cara alasan penghakiman ditulis dalam kes ini, ia tidak patut diambil kira sebagai mengizinkan perbuatan menyalin penghujahan bertulis. Ia adalah sangat tidak wajar bagi seorang hakim untuk menyalin penghujahan bertulis daripada peguam secara menyeluruh, dan tanpa memperakui sumbernya. Dalam kes ini, ia amat jelas dalam penghakiman hakim itu bahawa penghujahan bertulis telah disalin secara menyeluruh tanpa pengesahan (lihat perenggan 34).

(5) Walau apa pun salinan penghasilan semula penghujahan alasan penghakiman pendakwaan, berdasarkan keterangan yang dikemukakan, hakim mungkin akan mendapat penemuan sama iaitu bahawa pendakwaan telah membuktikan kes prima facie terhadap perayu. Terdapat banyak keterangan untuk menyokong penemuan hakim bahawa perayu mempunyai jagaan, kawalan dan mens rea terhadap milikan dadah itu dan dalam menggunakan andaian s 37(da) Akta tersebut. Oleh itu berdasarkan keseluruhan keterangan, hakim itu

dengan wajar telah memerintahkan perayu memasuki pembelaannya (lihat perenggan 36).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Francis bin Antonysamy v PP [2005] 3 MLJ 389; [2005] 2 CLJ 481, CA (refd)
Md Zainudin bin Raujan v PP [2013] 3 MLJ 773; [2013] 4 CLJ 21, FC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 1 CLJ Rep 311; [1991] 3 CLJ 2073, SC (folld)
Ng Chai Kem lwn Pendakwa Raya [1994] 2 MLJ 210; [1994] 2 CLJ 593, SC (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630; [2013] 4 CLJ 149, FC (refd)
Wong Joo Sen v PP [2011] 1 MLJ 581; [2010] 8 CLJ 392; [2010] 1 LNS 765, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(da), 37A(1)(b), 39B(1)(a)
Evidence Act 1950 s 27

Appeal from: Criminal Trial Nos 45A-171 and 172 of 2010 (High Court, Shah Alam)

Ameenuddin Ibrahim (Ameen Harbajan & Co) for the appellant.
Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Aziah Ali JCA (delivering judgment of the court):

[1] The appellant was charged with two offences under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in 26,462g of cannabis in a Volvo car bearing registration No PBE 5155 at the car park of Block B, Pangsapuri Seri Nilam, Bandar Baru Ampang, Selangor on 14 July 2010 at about 7.40pm, and for trafficking in 780g of cannabis in apartment B-12, 7th Floor of the same apartment block at 8pm on the same date. He was found guilty and convicted on both charges by the High Court at Shah Alam and was sentenced to death, hence the appeal to this court.

[2] We heard his appeal and by a unanimous decision we dismissed his appeal and affirmed the convictions and sentences. We now give our reasons below.

SALIENT FACTS

[3] On 14 July 2010, SP6 Mohd Normal Hisyam bin Malkan led a police team to conduct an operation in the area of Masjid Kg Baru, Kuala Lumpur. The appellant was seen arriving on a Yamaha Nuovo motorcycle bearing registration No WTN 5549 (exh P100). Evidence adduced by the prosecution shows that the motorcycle was bought in February 2010 by SP5, Sahul Hameed, who is a contractor and had employed the appellant as a site supervisor. The motorcycle was for the appellant's use. SP5 paid the monthly instalments for the motorcycle.

[4] The appellant parked the motorcycle at the rear of the mosque. SP6 and his team then rushed and arrested the appellant and found six packets suspected to be cannabis. SP6 conducted a search on the motorcycle and underneath the seat SP6 found a chocolate-colored sling bag (exh P109). From the bag SP6 found one set of house keys (exh P110), one set of car keys (exh P126) and a black wallet. Inside the wallet (exh P118) was the appellant's identity card. SP6 gave the bag back to the appellant to hold. The motorcycle key (exh P120) and road tax (exh P119) were recovered from the appellant's right trouser pocket.

[5] In cross-examination SP6 agreed that after the appellant was arrested and the car keys and house keys were found, he administered the caution under s 37A(1)(b) of the Act. The appellant indicated that he understood the caution. SP6 asked the appellant certain questions. Pursuant to the answers given by the appellant, SP6 and his team together with the appellant went to the Pangsapuri Seri Nilam in Ampang.

[6] At the parking lot beneath the apartment block, the appellant pointed out a blue colored Volvo car bearing registration No PBE 5155 (exh P101). Evidence was adduced which showed that this car was bought by SP5 who had given the car to the appellant in early 2009. Since SP5 handed over the car to the appellant, he had never used the car. There is only one set of keys to the car.

[7] SP6 asked for the keys to the car and the appellant took out the keys from the sling bag exh P109. Using the key, SP6 opened the car boot and found two bags bearing the brand name 'Platinum Jeans' (exh P83) and 'Defender' (exh P61) respectively. From exh P83, SP6 recovered ten packets of compressed material suspected to be cannabis wrapped in transparent sellotape. From exh P61, SP6 recovered 19 packets of compressed material suspected to be cannabis also wrapped in sellotape.

[8] SP6 then asked certain questions to the appellant and pursuant to his answers, they proceeded to the appellant's apartment on the 7th Floor. SP4

Rusmah Abdullah, the appellant's wife, in her evidence confirmed that she and the appellant had been staying at the said apartment owned by the late wife of SP5, since early 2009 at a monthly rental of RM500. This was confirmed by SP5.

[9] SP6 gained entry into the apartment by using the house keys given to him by the appellant. Inside the apartment, SP6 said the appellant showed him a bag bearing the brand name 'Uptown' (exh P11) which was in a room in the apartment. From this bag, SP6 found an orange colored plastic bag (exh P12) and inside it SP6 found three packets of compressed material suspected to be cannabis wrapped in sellotape (exhs P13–P15). From a cabinet in the room SP6 found the appellant's identity card (exh P117).

[10] SP6 assisted by one ASP Badrol and one D/Sgt Sahdan then took the appellant together with the exhibits seized to the Criminal Investigation Department at the Police Headquarters, Kuala Lumpur. At the police headquarters, SP6 marked the bag with the brand name 'Platinum' as 'B' and the ten plastic packets found inside it as 'B1' to 'B10' and signed his name (exhs P63–P81). SP6 weighed the bag together with the contents and found the gross weight to be 9,353g.

[11] SP6 marked the bag bearing the brand name 'Defender' as 'C' and the 19 packets found inside it as 'C1' to 'C19' and also signed his name (exhs P23–P59). He weighed the bag together with its contents and found the gross weight to be 17,844g.

[12] SP6 marked the bag with the brand name 'Uptown' as 'D1'. The orange colored plastic and the three plastic packets found inside it as 'D2' to 'D5' respectively. Similarly, he put his signature on the exhibits. He also weighed this bag together with its contents and found the weight to be 827g.

[13] SP6 handed over the exhibits seized from the appellant at the time of arrest in Kg Baru to the investigating officer in Kuala Lumpur, SP7 Insp Prakphat s/o Tim, while the exhibits seized in Ampang (exhs P121–122) were handed over to SP12 Insp Mohd Asraf bin Mohd Sikon (exhs P123–124) who kept the exhibits in a locked locker in his office. On 16 July 2010 SP12 went to the appellant's apartment to conduct investigation. SP6 was already there when he arrived. Apart from taking photographs of the interior of the apartment and the parking lot beneath the apartment, SP12 found one blue colored t-shirt (exh P102) from the master bedroom. SP12 had also taken photographs of the Volvo car and from inside the car SP12 found one black colored t-shirt (exh P103).

[14] On 20 August 2010 SP12 sent the exhibits to the Chemistry Department. SP1, Maimonah bt Sulaiman received a box marked 'X' inside which were the bag marked as 'D1' (exh P11) and three packets of compressed material wrapped in plastic and sellotape marked as 'D3/D4' and 'D5' (exhs P13–P15) which were inside an orange-colored plastic bag marked as 'D2' (exh P12). SP1 found the compressed material to be cannabis. SP1 prepared her report (exh P8) which shows that the net weight of cannabis in the three packets is 780g.

[15] On the same date, SP12 handed over two boxes marked 'Y' and 'Z' respectively to chemist SP2, Zulkefli bin Mohd Edin. Box 'Y' contained the bag exh P61 and 19 packets of compressed material wrapped in plastic and cellotape marked 'C1' to 'C19' (exhs P23–P59). The box marked 'Z' contained the bag exh P83 and 10 packets of compressed material marked as 'B1' to 'B10' (exhs P63–P81). SP2 confirmed the compressed material in both boxes to be cannabis. SP2 prepared his report (exh P20) which shows that the net weight of the cannabis in box 'Y' is 17,365g and the net weight of the cannabis in box 'Z' is 9,097g.

[16] In her evidence SP4, Rusmah Abdullah the appellant's wife, confirmed that the sling bag exh P109, the bag bearing the brand name 'Defender' exh P61, the motorcycle exh P100, the Volvo car exh P101, the jacket bearing the brand name 'Sony' exh P102, a black t-shirt exh P103, the motorcycle helmet exh P106 all belonged to the appellant. However SP4 was not able to identify the 'Uptown' bag (exh P11) when shown the photograph of the bag. She also said that she had one set of keys to the apartment and the appellant had the other set. SP4 was not able to identify the items in photographs marked P21 Nos 1–5.

[17] On the evidence adduced by the prosecution, the learned judge found that the prosecution has proved that the appellant had custody, control and mens rea possession of the drugs. In finding that the prosecution has established a prima facie case against the appellant, the learned judge considered:

(a) the evidence of SP6 that the appellant had the keys to the car and the house;

(b) the discovery of the drugs in the car and the apartment were pursuant to the answers given by the appellant to SP6;

(c) that the appellant had led SP6 and his team to his car and his apartment;

(d) the evidence of the appellant's wife that she had never seen the bags in which the drugs were found; and

A (e) the evidence of SP6 that the appellant was in a state of *menggelabah dan resah*.

The learned judge invoked the presumption of trafficking under s 37(da) of the Act. The appellant was ordered to enter his defence.

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[18] Essentially the appellant's defence was that he had no knowledge of the drugs and that the drugs belonged to one 'Misai'. According to the appellant, he was also a masseur and he would go to his client's house or his clients would come to his apartment. The appellant says that two days before his arrest, SP11 C Azizi bin Saleh, who is also known as 'Misai'. had come to his house for a massage. SP11 had brought a bag with him and when SP11 left after the massage, SP11 had left the bag in his apartment. SP11 had also requested to borrow his car and he had lent the car to SP11, who then returned the car to him on the morning of the day that he was arrested. Thus the defence sought D to show that the drugs found in the car and in the apartment belonged to SP11. SP11 in his evidence admitted that he knows the appellant and his wife SP4, but denied having gone to the appellant's house or having borrowed the appellant's car or motorcycle. He said he has his own car. He denied having seen the bags exhs P11, P61 and P83 or knowing their contents.

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[19] At the end of the defence case, the learned judge found that the defence is an afterthought. Her Ladyship accepted the evidence of SP11 and found that the evidence of the investigating officer SP12, who testified that his F investigation showed that SP11 was not involved in this case, supported SP11. The learned judge had also considered the evidence of SP4, the appellant's wife, who testified that when she visited the appellant at the prison after his arrest, the appellant had told her that SP11 had come to the apartment for massage one or two days before the incident and had also borrowed the car. However she G was not able to confirm the truth of what the appellant had told her. She also had no knowledge about the bags, exhs P61 and P83. In conclusion, the learned judge found that the defence had failed to raise a reasonable doubt in the prosecution's case and the appellant was found guilty and convicted.

H THE APPEAL

[20] Before us learned counsel for the appellant, Encik Ameenuddin Ibrahim raised the following issues:

I (a) that the learned judge had erred in allowing prejudicial evidence and had failed to hold a trial within a trial;

(b) that the learned judge had failed to apply the '*Radhi* direction'; and

(c) that the learned judge had failed to judicially appreciate the entire case.

THE FIRST ISSUE

[21] This issue relates to the answers given by the appellant in response to questions by SP6. SP6 agreed with learned counsel that he had administered the caution after he recovered the car keys and the house keys from the appellant from the chocolate-colored sling bag (exh P109) which was found underneath the motorcycle's seat. SP6 said he had read out the caution under s 37A(1)(b) of the Act which was recorded in his investigation diary ('ID') and had explained it to the appellant. The appellant indicated that he understood the caution. However SP6 did not record the questions asked and the appellant's answers. SP6 said he asked the appellant 'ada lagi tak dadah jenis ganja yang kamu simpan' and the appellant said 'ada lagi lebih kurang 29 ketul disimpan di dalam but kereta Volvo yang diparking di kawasan rumah'. Pursuant to this, the police party and the appellant proceeded to the Pangsapuri Seri Nilam. After SP6 seized the drugs found in the boot of the car, he asked the appellant 'ada lagikah dadah ganja ini?' and the appellant replied 'ada lagi sikit di dalam rumah'. Then they proceeded to the appellant's apartment from where SP6 seized the bag exhibit (exh P11).

[22] Learned counsel submitted that the evidence of SP6 regarding his questions to the appellant and the answers by the appellant ought not to be admitted. Learned counsel submitted that the trial judge ought to have held a trial within a trial to determine the admissibility of the statements made by the appellant in order to determine whether the appellant did give the information to SP6. It is contended that there is a possibility that the information came from SP11 who could have been arrested earlier on the same day that the appellant was arrested.

[23] The learned deputy public prosecutor ('the DPP') relied on s 27 of the Evidence Act 1950 and submitted that no trial within a trial was required since voluntariness is not an issue with regard to statements made under s 27. In support, the learned DPP referred to the case of *Francis bin Antonysamy v Public Prosecutor* [2005] 3 MLJ 389; [2005] 2 CLJ 481. In that case, one of the issues before the Federal Court was whether the information supplied by the accused under s 27 of the Evidence Act 1950 was admissible. The late Augustine Paul JCA (as he then was) in delivering the judgment of the court said, inter alia, as follows:

> It has been established by a long line of authorities that s 27 is independent and is not subject to the voluntariness rule in s 24.
>
> The fact that s 27 has been specifically enacted is therefore a clear indication that it has a purpose of its own to serve. As it applies only to a restricted and specified type of evidence as opposed to s 24 it can only mean that it is an independent provision which is unaffected by s 24, or, for that matter, any other statutory provision regulating the manner of taking or recording statements from any person. This is

illustrated by the established rule that information relating to facts discovered in consequence of a confession rendered inadmissible by reason of being involuntary is still admissible under s 27. Since voluntariness is not a condition of admissibility of information supplied under s 27 the privilege against self-incrimination which is manifested in an involuntary statement or in a statement made in breach of the requirements of s 112 must be deemed to have been impliedly abrogated insofar as s 27 is concerned.

We agree with *Goh Ching Ang v Public Prosecutor* [1999] 1 CLJ 829 that information supplied under s 27 which has been found to be involuntary may be excluded by the court in the exercise of its discretion. As the exclusion of the evidence is discretionary the exercise of the discretion depends on the facts of each case.

In my opinion, the degree of involuntariness that can be said to be sufficient to exclude a s 27 statement in the exercise of the discretion of the court must be balanced against the fact that involuntariness is not a condition of admissibility of such a statement. Therefore the circumstances of involuntariness must indeed be extraordinary in order to exclude a statement on a ground which, in the first place, does not affect its admissibility in law.

The party that is seeking to have evidence excluded in the exercise of the discretion of the court has the onus of showing, on the balance of probabilities, that the discretion should be exercised in its favour.

[24] We have perused the evidence of the appellant and nowhere in his evidence did the appellant allege that force or coercion was used on him by SP6. Nowhere in the submissions made by learned counsel is the issue of voluntariness raised.

[25] In *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630; [2013] 4 CLJ 149 Ahmad Maarop FCJ said, inter alia, as follows:

The information admissible under s 27 of the Evidence Act 1950 includes the accused's statement or his act or conduct, such as pointing, which led distinctly to the discovery of a fact. For such information to be admissible, there was no duty on the prosecution to prove the voluntariness of the information. Hence, a trial within a trial to determine the voluntariness of the information was not necessary. The appellant's evidence is a denial of any statements made to SP6. However it is apparent from the judgment of the learned judge that Her Ladyship did not accept his evidence. We find no ground to disagree with Her Ladyship.

[26] On the evidence, we find that the appellant did make the statements to SP6 voluntarily. Thus, the question of holding a trial within a trial does not arise. We also find no basis for the submissions made by learned counsel that possibly it was SP11 who had supplied the information leading to the discovery of the drugs. Having perused the cross-examination of SP11, we find that SP11 was not asked whether he was the person who had given to the police the information that led to the discovery of the drugs. In fact, SP11 in

cross-examination disagreed with the suggestion that he was arrested on the same day that he had returned the car to the appellant. We find that the appellant's answers to SP6 together with his conduct which led to the discovery of the drugs in the car and in his apartment are admissible. Therefore the learned judge has not misdirected herself in considering these matters when making her decision at the end of the prosecution case. For these reasons we find no merit on this issue.

THE SECOND ISSUE

[27] In the grounds of judgment, the learned judge stated that the prosecution has proved its case beyond reasonable doubt and the defence has failed to raise any reasonable doubt in the prosecution case. Her Ladyship said as follows:

> Berdasarkan kepada alasan alasan di atas, mahkamah memutuskan yang pihak pendakwaan berjaya buktikan kes di luar keraguan yang munasabah dan pihak pembelaan telah gagal untuk menimbulkan sebarang keraguan dalam kes pendakwaan dan jika dilihat keseluruhan keterangan-keterangan di akhir kes. Maka, OKT didapati salah dan disabitkan dengan pertuduhan-pertuduhan ke atasnya dan dijatuhkan hukuman gantung sampai mati.

[28] Learned counsel submitted that the learned judge has misdirected herself when Her Ladyship had failed to apply the '*Radhi*'s direction', in reference to the case of *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 1 CLJ Rep 311; [1991] 3 CLJ 2073, ie by failing to make a finding whether the defence case had rebutted the presumption under s 37(da) of the Act.

[29] In *Radhi*'s case, the Federal Court found that the learned judge offered practically no reason why the defence, notwithstanding its falsity and unconvincing nature, had failed to cast a reasonable doubt on the prosecution's case, other than to state by way of lip service the duty placed by the law on the defence to earn an acquittal. In those circumstances, The Federal Court said that:

> Whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v Public Prosecutor* [1963] 1 MLJ 263; [1963] 1 LNS 82 examine whether even though the court is not satisfied with the defence story, to ask whether in spite of this, the defence story casts a reasonable doubt on the prosecution case. To satisfy this test, of importance is not the words used by the judge but rather the actual application of the test to the facts of the case. In this case, unless the evidence in a particular case does not obviously so warrant, it is incumbent for the court to consider whether on a balance of probability on the evidence the defence has rebutted the statutory presumption of trafficking under s 37(da) of the Act as a separate exercise even though the court is satisfied on a balance

A that the presumption of possession under s 37(d) of the Act has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction.

B **[30]** In the case of *Wong Joo Sen v Public Prosecutor* [2011] 1 MLJ 581; [2010] 8 CLJ 392; [2010] 1 LNS 765, one of the issues before the Federal Court was whether there was a misdirection on the standard of proof by the trial judge. It was asserted that the trial judge committed a misdirection when she ruled that the defence failed to cast doubt on the truth of the prosecution's case. The Federal Court held, inter alia, as follows:

C

> ... it was clear that the trial judge went on to say that the court was satisfied that the prosecution had proved the charge preferred against the appellant without any reasonable doubt. It should also be noted in this case that the burden was on the appellant to rebut the presumption of trafficking on the balance of probabilities. Anyway, the expression 'as to the truth of the prosecution's case' is quite commonly used by judges and should hardly be taken as a misdirection. It does not demand a heavier burden on the defence. Thus, there was no merit in the second issue. The trial judge's usage of the expression complained of had not occasioned any miscarriage of justice that would warrant the setting aside of the conviction. In any event, the present case was substantially factual and an appellate court should be slow in interfering with the trial judge's findings of fact.

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[31] In *Ng Chai Kem lwn Pendakwa Raya* [1994] 2 MLJ 210; [1994] 2 CLJ 593 Wan Yahya bin Pawan Teh HMA said, inter alia, as follows:

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> In ordinary circumstances where the prosecution invokes a statutory presumption to prove its case, a mere denial by the accused either made orally or by implication from evidence contrapositive to the presumed fact must necessarily be regarded as a refutation of the presumption by the defence.
>
> In such event the trial Judge is under a duty to reexamine the factual dispute however trivial affecting the presumed fact and come to a definite conclusion on the balance of probabilities. Failure to do so would be tantamount to a serious denial of justice.

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H **[32]** Reverting to the present appeal, the learned judge had considered the evidence of SP11 and had accepted it. Assessing credibility is difficult and is best left to the trial judge who had the audio visual advantage of a witness in action, (see *Md Zainudin bin Raujan v Public Prosecutor* [2013] 3 MLJ 773; [2013] 4 CLJ 21 (FC)). Her Ladyship also found that the evidence of SP12, the investigating officer, who testified that his investigation showed that SP11 was

I not involved, as supporting the evidence of SP11. Having considered the defence evidence and the prosecution evidence, Her Ladyship came to the definite conclusion that the appellant's defence is an afterthought and that the defence had failed to raise a reasonable doubt in the prosecution case. We agree with the learned judge. We find no merit on this issue.

THE THIRD ISSUE

[33] Learned counsel submitted that the learned judge had failed to judicially appreciate the entire case because at the end of the prosecution case Her Ladyship had, in her grounds of judgment, adopted large parts of the written submissions of the prosecution (see p 8 of learned counsel's written submissions). The learned DPP in his reply conceded that the learned judge had reproduced 20 pages out of 98 pages of the written submissions of the DPP in the court below. However, it is submitted that the learned judge did consider the submissions by both parties and having done so, agreed with the prosecution and adopted the written submissions of the prosecution. The learned DPP submitted that it is not wrong for the learned judge to reproduce parts of the written submissions of the prosecution when Her Ladyship agreed with the prosecution on any particular issue. It was further submitted that despite the shortcomings in the learned judge's grounds of judgment, the evidence adduced by the prosecution is strong and no appellate intervention is warranted.

[34] Whilst we agree with the position taken by the prosecution in relation to the manner the grounds of judgment was written in this case, we are not to be taken as condoning the act of copying written submissions. We are of the view that it is highly improper for a judge to copy the written submissions of counsel wholesale, and without acknowledging the source. In the present case, it is patently clear in the judgment of the learned judge that the written submissions had been copied wholesale without acknowledgment.

[35] We wish to refer to the case of *Cojocaru v British Columbia Women's Hospital and Health Centre* [2013] 2 SCR 357. In that case, the main question in the appeal before the Supreme Court of Canada was whether a trial judge's decision should be set aside because his reasons for judgment incorporated large portions of the plaintiff's submissions. We respectfully adopt the views as expressed in the judgment of the Honourable Chief Justice wherein he said, inter alia, as follows:

> ... It may not be the best practice for judges to bulk up their judgments with great swaths of borrowed material. But the fact remains that borrowed prose, attributed or otherwise, does not, without more, establish that the judge has failed to come to grips with the issues required to be decided.
>
> To set aside a judgment for failure to attribute sources or for lack of originality alone would be to misunderstand the nature of the judge's task and the time-honoured traditions of judgment-writing. The conventions surrounding many kinds of writing forbid plagiarism and copying without acknowledgment.

His Lordship said further:

> To sum up, extensive copying and failure to attribute outside sources are in most situations practices to be discouraged. But lack of originality and failure to attribute sources do not in themselves rebut the presumption of judicial impartiality and integrity. This occurs only if the copying is of such a character that a reasonable person appraised of the circumstances would conclude that the judge did not put her mind to the evidence and the issues and did not render an impartial, independent decision.

Thus the Supreme Court concluded that while it is desirable that judges express their conclusions in their own words, incorporating substantial amounts of material from submissions or other legal sources into reasons for judgment does not, without more, permit the decision to be set aside. Only if the incorporation is such that a reasonable person would conclude that the judge did not put her mind to the issues and decide them independently and impartially as she was sworn to do, can the judgment be set aside.

[36] In the present appeal, we have carefully scrutinised the grounds of judgment of the trial judge and we agree with the learned DPP that, notwithstanding the copious reproduction of the prosecution's submissions in the grounds of judgment, on the evidence adduced, the learned judge would have come to the same finding ie that the prosecution has established a prima facie case against the appellant. We find ample evidence to support the finding of the learned judge that the appellant had custody, control and mens rea possession of the drugs and in invoking the presumption under s 37(da) of the Act. Thus on the totality of the evidence we find that the learned judge is correct to order the appellant to enter his defence. Having considered the defence and having re-examined the prosecution case, Her Ladyship found that the defence is an afterthought. We find no reason to disagree. Having perused the evidence we find that the defence had failed to rebut the presumption under s 37(da) of the Act. We find that the conviction is safe.

[37] For the reasons stated above, we dismissed the appeal and affirmed the conviction and sentence.

Appeal dismissed; the conviction and sentence affirmed.

Reported by Afiq Mohamad Noor